UNITED STATES SUPREME COURT

No. 61.

MORDECAI & CO.

vs.

W. & N. LINDSAY, Owners of "Mary Eddy."

The controversy arises out of the non-delivery of a cargo of sugars, shipped from New Orleans and consigned to appellants at Charleston.

The District Judge pronounced in favor of libellants. His decision was reversed by the Circuit Court, and the libel dismissed. On appeal to this Court, the decree of the Circuit Court was reversed, leaving the case as it stood upon the decision of the District Judge, which directed the Commissioner "to ascertain the charges to be made against the respective parties to the suit, and state the account between them. For this purpose he is authorized to use the testimony already reported, and such further evidence as may be brought before him in relation to that point." (19 Howard, 200.)

Upon this reference being executed, and on excep-

tions to the same, the District Judge, on the second hearing, again decreed in favor of the libellants. This decree was reversed by the Circuit Court, which dismissed the libel, and it is on the appeal from this decree that the case is now presented.

The material facts disclosed by the report of the Commissioner are, that the master of the Mary Eddy stored the sugars in his own name, on 5th April, 1854, in Brown's warehouse, and subject to his own order. At this time the sugars were worth $6,901 97, and the schooner's claim for freight on the same was $641 40. Here it was allowed to remain, subject to the heaviest charges, until 21st November, 1855, when Brown, the storehouse-keeper, without any assent of the appellants, sold to satisfy his account for storage, fifty-one of the ninety-nine hogsheads, for the sum of $2,314 77, from which he deducted his account of $1919 91 for storage, and paid the remainder to the schooner's agent. The remaining number of hogsheads were detained until the 22d January, 1856, when they likewise were sold by order of the schooner's agent, who paid an additional storage of $204 84 out of the amount of this second sale, reserved $759 05 for freight and interest thereon, and tendered $2,400 for the consignment of the sugars.

The evidence shows that the goods had been damaged on the voyage; and though the libellants may have originally acted on the assumption that they had the right to the possession of the goods before the freight was demandable, yet subsequently, upon consultation with

their counsel, Brown & Porter addressed through them the letter of 4th April (p. 29), in which they state that "they are ready to pay you the freight upon your delivery to them of the entire consignment, in accordance with the bill of lading. That they are willing to give any security for the freight, but will not consent to pay the freight, as you have demanded in your letter, when a larger portion of the consignment is in your possession under circumstances which authorize the belief that they may sustain considerable damage ; and that unless this matter is adjusted to their satisfaction by 10 o'clock to-morrow, they will proceed to libel the vessel."

No reply was ever made to this offer. On the 4th April but a portion of the cargo was landed, and on the 5th the remainder, when the whole was stored in the warehouse.

There is no dispute as to the right of lien for freight upon the cargo ; but it is submitted that the consignee has the right to inspect the whole consignment before he can be called upon to pay the freight.

The master is not entitled to detain the goods in his ship until the payment of the freight, and thus deprive the consignee of the opportunity of inspecting them, and of ascertaining if they had been injured by the master's fault.

This was the rule, under the Empire, of the ordinance, and is under the Code of Commerce. In England the same law obtains (Abbot on Shipping, Marg. p. 285), and the decisions in this country are to the same effect.

In the case of certain logs of mahogany (2 Sumner, 601), Mr. Justice Story thus states the law: "The shipper cannot ordinarily insist on a delivery of the goods until the freight is paid or secured, according to the terms of the agreement. But then the owner is not at liberty to insist that the goods shall not be landed before such security or payment is made. On the contrary, the shipper has the right, as it should seem by the maritime law, to insist upon examining the goods after they are delivered, in order to ascertain whether they are damaged or not, before he makes himself liable, at all events, for the freight."

So the modern Code of France (Lib. 2d, tit. 8 art. 306) declares that the master shall not retain the merchandise on board of his ship for default of the payment of freight; but he may, at the time of discharging, insist upon having it deposited in the hands of a third person until the freight is paid.

It is a general rule that the common carrier is bound to deliver goods personally to the consignee at the place of delivery; but in certain cases, where the transportation is by vessel, notice of the arrival and place of deposit is sufficient, and comes in place of personal delivery; and where goods are conveyed safely to the place of destination, and the consignee is dead, absent, or *refuses to receive*, the carrier may discharge himself from further responsibility by placing the goods in store with some responsible person, for and *on account of the*

owner. In such case, the storehouse-keeper becomes the agent or bailee of the *owner of the property*.

[Fisk *vs.* Newton, 1 Denio, 45.

Here the property was stored by the Captain, and subject to *his order alone*. The appellants were not even allowed to inspect the same, though two applications were made for that purpose (p. 60). The goods were stored without even an agreement for the storage, which was out of the usual course of business (Street's evidence, p. 52). In consequence of this gross negligence, the enormous charge of one dollar per month was levied on the sugars, which consumed the greater part of their value, though the libellants by letter had informed them that storage could be procured at 25 cents (p. 20), and the report of the Commissioner shows that but 40 cents should be allowed (p. 72).

The case stands thus: The master having property in his possession ten times greater than his own demand, has so dealt with it as to render it almost valueless to the owner.

He has acted on the assumption that his lien gave him the right to sell, and made two sales against the protest of the owner (p. 60).

Whether by the law he had this right of sale need not, therefore, be inquired into. He clearly had the right to apply to the Court for the purpose of enforcing his lien for the freight.

But when is this to be done? Has the master the right to detain the goods for an indefinite time? We

assert that when he assumes to keep possession and control, he must act as a prudent administrator, and in good faith to the owner of the goods. He could have sold the goods as soon as the parties refused to pay the freight, or procured an order of the Court, if he preferred it, and thus secured his own rights and protected the interests of the owner. If he had applied to the Court, the property would have been delivered to the claimant upon a proper stipulation, preserving the rights of the master. If the consignee had been dead or absent, the case might be more palpable, but the rules of law applicable would be the same. The reasons urged on this point by the District Judge on decreeing for the libellants are most ably stated (p. 48), and should be conclusive of the rights of the parties in this litigation.

P. PHILLIPS,

For Appellants.

F. W. Clarke

of Counsel